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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO

BEN EZRA, WEINSTEIN AND COMPANY

Plaintiff,

**FILED**  
UNITED STATES DISTRICT COURT  
ALBUQUERQUE, NEW MEXICO

v.

DEC 17 1998

No. Civ. 97-0485 LH/LFG

AMERICA ONLINE, INC.,

Defendant.

*R. P. [Signature]*  
CLERK

**STIPULATION AND PROTECTIVE ORDER CONCERNING CONFIDENTIALITY**

Plaintiff Ben Ezra, Weinstein and Company, Inc. ("BEW") and defendant America Online, Inc. ("AOL"), through their undersigned counsel, hereby stipulate that the following procedures and provisions shall apply to discovery in this civil action in order to expedite the flow of discovery material, and to protect confidential information.

1. Any party involved in this litigation may designate any document or information disclosed through discovery or otherwise in the course of this litigation as "Confidential Material" in the manner set forth in paragraph 2 of this Order. Such designations shall be made only when the designating party has a good faith belief that the material constitutes trade secrets, proprietary information, or other confidential information that would be the subject of protection under the Federal Rules of Civil Procedure and judicial precedents relating to confidentiality and accessibility of documents. Such designation shall, without more, subject the designated material to the provisions of this Stipulation and Protective Order, and all such material shall be protected, used, handled and disposed of strictly in accordance with the provisions of this Order.

2. “Confidential Information” shall be designated as such by a party, as

follows:

- a. In the case of documents and information contained therein, designation shall be made by marking the words  
“CONFIDENTIAL -- BEN EZRA WEINSTEIN AND  
COMPANY, INC. v. AMERICA ONLINE, INC.” and “SUBJECT  
TO COURT ORDER” on the face of each document and each page  
so designated at the time it is produced or served.
- b. In the case of responses to interrogatories or requests for  
admissions and the information contained therein, the designation  
shall be made by means of a statement at the beginning and the  
conclusion of such responses (or in conjunction with the  
subsequent furnishing of any responsive information) specifying  
the responses or parts thereof deemed confidential.
- c. In the case of depositions, any party may designate all or any  
portion of the deposition testimony given in this litigation as  
Confidential Information, either orally during the deposition or in  
writing within 10 business days after receipt of the deposition  
transcript. Confidential Information within a transcript of a  
deposition may be designated by underlining portions of the pages  
that are confidential and marking such pages as set forth in  
subparagraph 2(a). Until expiration of the 10-day period, the entire  
deposition shall be treated as Confidential Information.

3. In the event that a party inadvertently produces documents or provides discovery responses that contain Confidential Information without designating them as such, the producing party may remedy such inadvertent production as follows:

- a. Within seven days after the discovery of such production, the party shall give written notice by facsimile to counsel for the party in receipt of such Confidential Information.
- b. On receipt of such notice, counsel shall within five days return the documents to the party and destroy any copies thereof.
- c. The party shall within five days thereafter produce alternate copies of the documents bearing the Confidential Information legend set forth in subparagraph 2(a).
- d. If counsel who received the Confidential Information already has disseminated it to any other person, including a party, he shall promptly notify all those persons in writing of the need to return such Confidential Information and not to further disseminate Confidential Information.

Neither the provisions of this Order, nor any designation or failure to designate any particular document or information as “Confidential Information” thereunder, shall, at any time or in any other litigation, constitute a waiver of any party’s assertion of confidentiality with respect to any document or information covered or not covered by this Order.

4. Unless otherwise ordered by this Court, any material or information designated as Confidential Information shall be used solely for the purpose of conducting this

litigation and not for any other purpose whatsoever, and shall be used only in accordance with the terms of this Stipulation and Protective Order.

5. The restrictions relevant to Confidential Information set forth in this Stipulation and Protective Order do not apply to the use of Confidential Information by the party that designated it as confidential.

6. Counsel to whom Confidential Information is disclosed shall not reveal or disclose Confidential Information or cause Confidential Information to be revealed or disclosed directly or indirectly, in any manner or in any form, to any person, entity, or judicial tribunal other than:

- a. a court in which this action or any appeal therefrom is pending;
- b. counsel of record to the parties in this litigation and employees under their direct supervision working on this matter;
- c. experts retained to assist a party in this action and employees under their direct supervision working on this matter;
- d. deponents and their counsel to the extent permitted by paragraph 9 below;
- e. a party and the officers, directors, and employees of a party; and
- f. an authorized court reporter in connection with proceedings in this action.

7. Counsel or experts to whom Confidential Information is disclosed shall maintain a current record of all persons to whom such Confidential Information is disclosed.

8. No person to whom Confidential Information is disclosed may disclose such Confidential Information to any person, except that counsel may disclose Confidential

Information to those persons described in paragraph 6 above. Except as to persons identified in paragraph 6a, no person (including parties and counsel) shall have access to Confidential Information without first having read, acknowledged, and agreed to be bound by this Stipulation and Protective Order by signing the form attached as Exhibit A hereto.

9. A deponent may, during his or her deposition, be shown, and be examined about, documents or information designated as Confidential Information only if counsel complies with the procedures set forth in this paragraph. The deponent may see and retain copies of Confidential Information only during his or her testimony, in preparation therefor, or in discussions of possible testimony, and may not thereafter retain any Confidential Information. A witness who will be shown or given Confidential Information must sign the attestation attached as Exhibit A hereto before being provided with or examined about Confidential Information. If a party expects to show a witness Confidential Information designated by another party during a deposition, that party should use all reasonable efforts to obtain the witness' attestation before the deposition begins. Nothing in this Stipulation and Protective Order shall be construed to preclude a party from asserting the right to object to the use of Confidential Information with any particular deponent.

10. Any party may object to the designation of any information or material as Confidential Information. Any such objection shall be made in writing and served on the other party. The designating party shall respond to the objection within 14 days of the receipt of such objection, or later by agreement with the objecting party, either by (a) withdrawing the designation in question and producing new copies of the documents that do not contain the legend or (b) refusing to withdraw the designation. If the designating party refuses to withdraw the designation, the objecting party may seek an order of the Court removing the specified

Confidential Information from the scope and coverage of this Order. The designated material in question shall continue to be treated as Confidential Information subject to the terms of this Order until the Court acts on the motion and thereafter if the Court's ruling does not remove the material from the scope and coverage of this Order.

11. Any written material constituting or disclosing Confidential Information that is filed with the Clerk of the Court, including court papers, shall be filed under seal that shall be labeled with the title of this action, an indication of the nature of its contents, the identity of the party filing the material, the words "CONFIDENTIAL INFORMATION," and a statement substantially in the following form:

CONFIDENTIAL  
SUBJECT TO PROTECTIVE ORDER

NOT TO BE OPENED NOR THE CONTENTS REVEALED EXCEPT  
(1) TO THE COURT OR (2) BY ORDER OF THIS COURT

The same statement shall be placed on the front page of the written material itself.

12. In the event that a person covered by this Stipulation and Protective Order ("the Receiver") receives a subpoena, discovery request, or other legal process seeking production of Confidential Information, the Receiver must give prompt written notice to the party that designated the Confidential Information. The Receiver shall inform the persons seeking the information of the existence of this Stipulation and Protective Order and shall not produce the Confidential Information absent a court order requiring such production.

13. Any excerpt, summary, or copy of any designated Confidential Information shall bear the Confidential Information legend set forth in subparagraph 2(a) and shall be subject to the terms of this Stipulation and Protective Order to the same extent as the information or document from which such excerpt, summary, or copy is made.

14. Nothing contained herein shall restrict the presentation of Confidential Information to a jury or the Court during a trial or other hearing in this action; and the parties shall maintain the confidentiality of any Confidential Information at a hearing or at a trial in such manner as the Court may direct.

15. The existence of this Stipulation and Protective Order, the contents of this Stipulation and Protective Order, or the disclosure of Confidential Information pursuant to this Stipulation and Order shall not, under any circumstances, be deemed to be an admission by any party of the authenticity, relevance, or admissibility of the Confidential Information it discloses hereunder.

16. The existence of this Stipulation and Protective Order, the contents of this Stipulation and Protective Order, or the disclosure of Confidential Information pursuant to this Stipulation and Order shall not, under any circumstances, bar any party from seeking from this Court greater protection for Confidential Information (or any other information or material) than that specified in this Stipulation and Order.

17. The existence and contents of this Stipulation and Protective Order shall not, under any circumstances, be deemed to be an admission or concession by any party that any other party is entitled to take or obtain any discovery or any form of discovery.


18. For good cause, any party may seek a modification of this Order, first by attempting to obtain the consent of the other party to such modification, and then, absent consent, by application to this Court.

19. This Order and the agreements embodied herein shall survive the termination of this action and continue in full force and effect.

20. Within 30 days after the termination of this action, all documents containing Confidential Information produced by any party to any other party shall, at the option of the party who designated the Confidential Information, be destroyed or returned to the originating party. All recipients of Confidential Material shall certify in writing to the producing and designating party or parties that they have complied with the provision of this paragraph.

21. This Stipulation and Protective Order shall become effective when signed by the parties and entered by the Court.

DATED this 11<sup>th</sup> day of December, 1998.

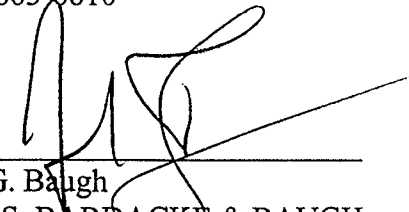
BY: 

Esteban A. Aguilar  
AGUILAR LAW OFFICES, P.C.  
1011 Lomas NW  
Albuquerque, NM 87102  
(505) 242-6677

*Counsel for Plaintiff*

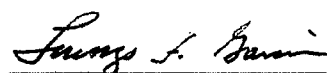
BY: 

Patrick J. Carome  
WILMER, CUTLER & PICKERING  
2445 M Street, NW  
Washington, DC 20037  
(202) 663-6610

  
John G. Baugh  
EAVES, BARDACKE & BAUGH  
6400 Uptown Boulevard NE  
Suite 110W  
Albuquerque, NM 87110  
(505) 888-4300

*Counsel for Defendant*

SO ORDERED, this 14<sup>th</sup> day of December, 1998.



United States Magistrate Judge



## EXHIBIT A

I hereby attest to my understanding that information, documents, and/or deposition testimony will be provided to me pursuant to the terms, conditions and restrictions of the Stipulation and Protective Order dated \_\_\_\_\_, 1998 in the case of Ben Ezra, Weinstein and Company, Inc. v. America Online, Inc., pending in the United States District Court for the District of New Mexico, No. Civ. 97-0485 LH/LFG; that I have been given a copy of and have read the Stipulation and Protective Order and have had its meaning and effect explained to me by the attorneys providing me with such information, documents, or deposition testimony; and that I hereby agree to be bound by the Stipulation and Protective Order and its terms. I further agree that I shall not disclose to others, except in accordance with the Stipulation and Protective Order, such information, documents or deposition testimony, or any matters learned therefrom, and that such information, documents or deposition testimony shall be used only for the purposes of the legal proceeding in which they were produced. I further agree and attest to my understanding that my obligation to honor the confidentiality of such information or documents will continue even after the termination of that legal proceeding. I further agree and attest to my understanding that, in the event that I fail to abide by the terms of the Stipulation and Protective Order, I may be subject to sanctions, including sanctions by way of contempt of court, imposed by this Court, for such failure. I further agree to the exercise of personal jurisdiction over me by the United States District Court for the District of New Mexico for purposes of

enforcement of the Stipulation and Protective Order, including any contempt proceeding for violation thereof.

BY: \_\_\_\_\_

DATE: \_\_\_\_\_

Subscribed and sworn to before me, a notary public, this \_\_\_\_\_ day of \_\_\_\_\_, 199\_\_.

\_\_\_\_\_  
NOTARY PUBLIC

My Commission Expires:

\_\_\_\_\_